Public Prosecutor v Alcontara

HIGH COURT (PENANG) — CRIMINAL TRIAL NO 47 (58)–39–88
VINCENT NG JC
27 NOVEMBER 1992

Criminal Law *— Dangerous drugs — Trafficking — Whether the seized plant material is 'cannabis' as statutorily defined — Distinction between trafficking or possession of cannabis plant and cannabis resin — What constitutes substantial extraction of cannabis resin — Method of analysis — Dangerous Drugs Act 1952 ss 2 &39A(2)*

Evidence *— Expert evidence — Chemist as witness — Whether opinion tenable in absence of quantitative analysis of presence of cannabis resin — Dangerous Drugs Act 1952 s 2*

Words and Phrases *— 'Substantial'*

The accused was accused with possession of eight packages containing tightly packed plant material suspected to be cannabis. He was charged with trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). The chemist's conclusion that the seized plant material was 'cannabis' as statutory defined under s 2 of the Act was challenged by counsel for the accused. Defence counsel also contended that there were no quantitative tests carried out for the presence of cannabis resin in the samples to determine the amount of cannabis resin extractable from them and that the samples taken by the chemist from the eight packages for testing were not homogenous samples of the bulk of plant material seized.

Held, acquitting the accused:

(1) As the gross weight of 20 random samples taken from each of the eight packages was in excess of the 50 g threshold required to trigger the operation of s 39A(2) of the Act, the contention that the samples were not homogeneous samples of the bulk seized is untenable.

(2) By the separate but close juxtaposition of the definition of 'cannabis' and of 'cannabis resin' in s 2 of the Act, the legislature had clearly intended to make a distinction between the offence of possession or trafficking in cannabis resin and cannabis plant in its natural state in wet or dried, but untampered by any extraction process, form.

(3) It was not positively established that the plant samples examined were plant material from which 'cannabis resin had not been extracted' as defined. At most, the evidence was that they were plant material from which resin had 'not been completely or substantially extracted'. In most matters, the word 'substantial' is premised on the availability of an ascertainable whole amount or quantifiable gross quantity.

(4) The court does not accept the expert opinion that there was 'no substantial extraction' of cannabis resin as it was not sustainable and was devoid of any rational, scientific or semantical basis. It was also not based on the results of any or any proper analysis by the chemist on the presence of cannabis resin in the samples taken. As such, the essential ingredient of the charge that the plant material seized was cannabis as statutorily defined was not made out at the end of the prosecution's case.

[Bahasa Malaysia summary

Si tertuduh telah ditangkap kerana memiliki lapan bungkusan yang mengandungi bahan tumbuhan yang dibungkus secara ketat. Bahan itu disyaki merupakan ganja. Beliau telah dituduh mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta itu'). Kesimpulan ahli kimia bahawa tumbuhan yang dirampas itu adalah 'cannabis' seperti yang ditakrifkan secara statutori di bawah s 2 Akta itu telah di cabar oleh peguambela si tertuduh. Peguambela juga berhujah bahawa kajian kuantitatif tidak dilakukan untuk kehadiran resin ganja di dalam sampel untuk menentukan amuan resin ganja yang boleh diekstrak darinya dan bahawa sampel yang diambil oleh ahli kimia itu dari lapan bungkusan untuk kajian tidak merupakan sampel homogen dari sebahagian besar daripada bahan tumbuhan yang dirampas.

Diputuskan, membebaskan si tertuduh:

(1) Oleh kerana berat kasar 20 sampel yang dipilih secara rawak dan diambil dari setiap satu daripada lapan bungkusan itu adalah lebih daripada nilai ambang 50g yang diperlukan untuk mencetus operasi s 39A(2) Akta itu, hujahan bahawa sampel itu tidak merupakan sampel homogen dari kesemua bahan yang dirampas tidah dapat dipertahankan.

(2) Dari tafsiran 'cannabis' dan 'cannabis resin' di dalam s 2 Akta itu yang diatur seiring, badan perundangan dengan jelas bermaksud untuk membuat pembezaan antara kesalahan memiliki atau mengedar resin ganja dan tumbuhan ganja dalam keadaan asalnya, dalam keadaan basah atau kering, tetapi tidak diusik oleh proses pemisahan.

(3) Tidak ada bukti yang pasti bahawa sampel tumbuhan yang dikaji adalah bahan tumbuhan 'ganja dari mana resinnya belum dipisah-kan' seperti yang ditakrifkan. Paling banyak, keterangan adalah bahawa bahan itu merupakan bahan tumbuhan dari mana resin-nya 'belum dipisahkan dengan sempurna atau dengan substan-tial'. Dalam banyak perkara, perkataan 'substantial' berdasarkan terdapatnya jumlah yang dapat dipastikan atau jumlah yang boleh dinyatakan kuantiti kasarnya.

(4) Mahkamah menolak pendapat pakar bahawa 'tidak terdapat pe-misahan substantial' resin ganja kerana ia tidak dapat diterima dan tidak mempunyai asas rasional, saintifik atau semantik. Ia

juga tidak berasaskan keputusan sebarang atau sebarang analisis yang betul oleh ahli kimia itu tentang kehadiran resin ganja di dalam sampel yang telah diambil. Oleh itu, faktor penting tuduhan itu bahawa bahan tumbuhan yang ditakrifkan secara statutori tidak dibuat pada penghujung kes pihak pendakwa.] A

[*Editorial Note*: The Public Prosecutor has appealed to the Supreme Court vide Civil Appeal No 05–230–92.] B

Cases referred to

1 *PP v Peter Yeoh & Anor* (Penang Criminal Trial No 47 (58–2–86)) (unreported) (refd) C
2 *Loo Keck Leong v PP* [1992] 2 MLJ 177 (refd)
3 *PP v Loo Keck Leong* [1991] 3 CLJ 2584 (refd)
4 *Shamsuddin bin Hassan & Anor v PP* (Ipoh High Court Criminal Trial No 58–6–86) (unreported)
5 *Ladbroke (Football) Ltd v William Hill (Football) Ltd* [1964] 1 All ER 465; [1964] 1 WLR 273 (refd) D
6 *Palser v Grinling*; *Property Holding Co Ltd v Mischeff* [1948] AC 291; [1948] 1 All ER 1 (refd)

Legislation referred to

Dangerous Drugs Act 1952 (Rev 1980) s 2, 39A(2), 39B E
Dangerous Drugs (Amendment) Act 1992
Criminal Procedure Code (FMS Cap 6) s 180

Karpal Singh (*Karpal Singh & Co*) for the accused.
Wong Teck Meng (Deputy Public Prosecutor) for the Public Prosecutor. F

Vincent Ng JC: The accused is charged as follows:

Bahawa kamu pada 11 Ogos 1987 jam lebih kurang 5.30 pagi di Jambatan Permatang Tok Labu, Kepala Batas, Seberang Perai, dalam Daerah Butterworth, di dalam Negeri Pulau Pinang, telah mengedar dadah berbahaya iaitu 70,952.1g ganja dan kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 (Semakan 1980) dan boleh dihukum di bawah s 39B(2) Akta yang sama. G

The prosecution adduced the following evidence:

Acting upon information that there would be a conveyance of drugs by a male Indian in a dark blue Mitsubishi Colt Gallant bearing registration no WBE 2789 ('the car') from Permatang Bendahari towards the direction of Pulau Pinang, PPP Abdul Wahab bin Embong (PW3) and Insp Mohd Amin bin Abdul Raof (PW4), together with five other police officers proceeded in a van and a car and took up various ambush positions at 4am on 11 April 1987 on both sides of the Bailey bridge ('the bridge') in Permatang Tok Labu, Kepala Batas, Seberang Perai, District of Butterworth, State of Pulau Pinang. The bridge was then under repair and because there was a row of drums placed on one side of the bridge, it could only take single lane traffic. H I

A On both banks of the river where the bridge spans, were street lights, which according to the witnesses, permitted clear visibility of the area in the vicinity of the bridge. At about 4.50am on the same morning, they saw a dark blue Mitsubishi Colt Gallant car driven by what appeared then to be a man, moving over the bridge and heading towards the direction of Permatang Bendahari. They continued to wait. Later, at about 5.25am, B they saw the same car bearing registration no WBE 2789, returning from the direction of Permatang Bendahari towards Permatang Tok Labu (ie also towards Penaga) and approaching the bridge. They then stopped the car on the bridge, with the aid of drums placed in its way. It was PW4 who stopped the car, opened its door, pulled the car key out of the ignition C keyhole and handed them to PW3 who was then beside him. The accused was the driver of the car wherein there were no passengers.

Then, PW3 identified himself as a police officer to the accused and instructed the accused to proceed to the boot of the car. Upon the instructions of PW3, the accused himself opened the said boot with the car key (earlier seized from him) that was handed back to him by PW3.

D In the boot of the car, the police officers found eight packages containing tightly packed plant material (P3–P10) suspected (then) to be cannabis. All the eight packages were individually wrapped with double or triple or quadruple layered large transparent plastic packets (P3B–P10B) ('the eight packages'). The accused was then arrested, and the passenger compart- E ment of the car and his person was searched. From this search, nothing incriminating was found, save that on the accused's person a wallet was recovered, which contained an identity card and a driving licence, both bearing the name of the accused. A sum of RM63 and several other items of little significance to the charge were also found in the wallet. The accused was then taken to and arrived at the police station in Kepala Batas at F 6.30am. PW3 then lodged Kepala Batas Report No 2882/87 on the aforesaid arrest.

Encik Mohd Jaafar bin Uda Umor (PW2), the officer in charge of vehicle registration for Federal Territory, testified that from his records, a blue coloured Mitsubishi Colt Gallant car bearing registration no WBE 2789 G was, with effect from 12 March 1986 as well as on 11 August 1987, registered in the name of one Aneeallzevet a/p Stephen, who later gave evidence as PW6.

Puan Aneeallzevet a/p Stephen (PW6) said that she was, on 11 August 1987 and until the day of the trial, the wife of the accused. She had purchased the car with the deposit solely borne by her, and the monthly H instalments thereon were paid jointly by her and the accused from the monthly income earned from the coffee stall operated by both of them. She also testified that on the day previous to her husband's arrest, he was at home with her the whole day until about 7pm when he went out alone in the car WBE 2789. That was the last she saw of him until she was informed I of his arrest. It is perhaps relevant here to bear in mind that the accused was the sole occupant of said car at the time of his arrest.

At the close of the case for the prosecution, I was satisfied on a prima facie basis that the accused was in control and custody of the eight packages seized from him and there was no break in the chain of handling of such

exhibits from the time of such seizure until they were produced in court. Save for the issues for judicial determination discussed hereinafter, the learned DPP had hitherto conducted a faultless prosecution of the case.

The only question I have to decide at this stage in the proceedings, upon a point taken by the defence counsel Mr Karpal Singh, is whether the plant material is 'cannabis' as statutorily defined under s 2 of the Dangerous Drugs Act 1952 ('the Act'). Another point taken by defence counsel is that the samples taken by the chemist from the eight packages for testing were not homogeneous samples of the bulk of plant material seized. On this point, I hold that as the chemist had said that he had taken 20 random samples from each of the eight packages, which totalled between 80–160g from the total mass of plant material seized — though he made no record of the actual weight of the samples taken — and as such, the gross weight of all the samples he took weighed in excess of the 50g threshold required to trigger the operation of s 39A(2) of the Act, the defence counsel's challenge on this score is untenable. See also my decision in the case of *PP v Peter Yeoh & Anor*[1] on the relevance of such a challenge as to the homogeneity of samples taken, in cases where the charge involved huge amounts of heroin seized.

Though the chemist, Mr Tai Teik Siew (PW1), had said in his evidence that he had examined the plant material and had found it to be 70,951.2g of cannabis, and he further said that, to quote: 'The cannabis mentioned by me above is as defined in the Dangerous Drugs Act 1952'. This assertion was strenuously challenged by the defence counsel.

In his evidence, PW1 acknowledged that the celebrated Supreme Court decision in *Loo Keck Leong v PP*[2] had been brought to his notice before he gave evidence. In the witness stand, he gave the court the impression of a chemist testifying under siege, who was unduly and overly eager to dovetail his purported test-finding with the said decision in *Loo*'s case.

On the issue of cannabis resin, he had this to say in his examination-in-chief and I quote: 'With the combination of all the four tests and not by individual tests alone, I concluded that the plant material was cannabis where resin had not been extracted' and he also said 'I do not know how much of resin was originally there. To me, extraction of resin means complete or substantial and since the resin was present in substantial amount I say that there was no extraction.'

Yet, it is inconceivable — and I am unable to accept — that the quantitative extent of the presence of cannabis resin in the plant material was his central or essential consideration at the time he tested the plant material samples taken from P3–P10, especially as they were tested some time between 14 August 1987 (when he received them from PW8) and 4 December 1987 (when he returned them to PW8), that is, some years before the 24 April 1992 decision in *Loo*'s case.[2] As such, it is equally incredible that he had, at the material time, consciously and pointedly found that cannabis resin had not been substantially extracted. What is indeed probable is that as he had done his analysis before the cannabis resin issue saw the light of day, he had dutifully and with a similar frame of mind, carried out and performed the similar standard tests employed by other chemists in *PP v Loo Keck Leong*[3] and *Shamsuddin bin Hassan & Anor*

v PP[4] and had made similar findings on such standard tests adopted by all government chemists, as commonly repeated in their evidence in every drug trial. Their essential and primary aim then was to detect the presence of cannabis resin in the plant material, irrespective of the quantity detected, for the sole purpose of driving home the conclusion that the plant material was cannabis. It is worthy of note that quantitative tests on cannabis resin in such plant material were tests then alien to such chemists. One may ask, have we heard from PW1, a different tune in court? Indeed the essence of the findings of the learned judges in both the aforesaid cases (and now expressed in the recent amendment on the definition of cannabis under Dangerous Drugs (Amendment) Act 1992) are consistent with the acceptance of the chemists' detection of cannabis resin, irrespective of quantity (this point being then a non-issue) as one of the confirmative or conclusive tests that the plant material was cannabis. After the decision in *Loo*'s case,[2] this would be uncomfortably close to the said amended definition.

The cagey and hesitant manner in which PW1 had given his evidence and his answers under cross-examination gave me the impression of a witness who had made a brave attempt to be wise after the event in respect of tests which he carried out about 4½ years before the decision in *Loo*'s case; the precise findings on which tests he now tries to relate from memory. He said that there are two ways of extraction of resin, being:

(a) by mechanical means; whereby the plant material is thrashed against a hard object, and this method being deliberate, would have destroyed the plant structure whereas he observed that the plant structures were still intact. Yet, he had also admitted that light thrashing of the plant material would remove some resin and such light thrashing would not change the physical integrity of the plant structure.

(b) by chemical solvents; whereby the resins would have been completely or substantially removed from the plant material, but as his tests showed that the resins were still present in abundance, he concluded that no extraction by organic solvent had ben carried out on the plant exhibit. Yet, he had also said that if the solvents had been used on the plant material for the extraction of resin, all his above tests would not show the presence of the solvent and he did not carry out any quantitative tests on the resin present inside and outside the plant material he examined. It would seem strange and incredible that he had, at that material time, looked for the abundance of resin in the plant material he examined when such a factor was then quite irrelevant to him as a chemist. As there were no colour charts to guide him in his thin layer chromotography test, the abundance of resin he claimed to have found by way of colour tone seen could, at the very most, only be his subjective opinion. Furthermore, considering the passage of time since his tests, it is remarkable that he made no reference to any working notes or entries in his papers to confirm his purported test-finding on this currently vital issue of the quantitative presence of cannabis resin; the ingredient 'being a matter of science and not being a question of ordinary fact normally perceivable by the senses...'.
(See the decision in *Loo*'s case.[2])

Even on the sum total of his evidence, he did not and could not say that, from the samples he tested, P3–P10 were plant material from which cannabis resin had not been extracted. At the highest watermark of his evidence, he only said that they were plant material from which resin had 'not been completely or substantially extracted'. A

When questioned by the court as to how he could conclude that there was no substantial extraction of the resin when he was totally without a clue as to how much cannabis resin was extractable from the samples he took from P3–P10, bearing in mind that he had not done any quantitative tests for the presence of cannabis resin in such samples, he was unable to give any satisfactory explanation. B

In *Loo*'s case,[2] the Supreme Court had made an eminently perceptive decision on a novel issue which had hitherto escaped the attention of the best legal brains in the country. The ratio decidendi in this decision being that the non-extraction of resin from any part of any plant of the genus cannabis is an essential ingredient of the charge of trafficking in cannabis. C

Following this decision, s 2 of the Act which reads as follows: ' "cannabis" means any part of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name it may be designated; [Sub Act A553].' The governing definition was, by virtue of the Dangerous Drugs (Amendment) Act 1992 amended to ' "cannabis" means any part of any plant of the genus Cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated (the amended definition)'. D E

Mr Karpal Singh had also submitted that as the word 'completely' ought not to be read into the phrase 'resin has not been extracted' (before the word extracted) in the governing definition, the word 'substantially' should, by the same token, also not be read into this definition. He further submitted that the issue of substantial extraction had not been pointedly decided in the decision in *Loo*'s case;[2] it was only by way of an obiter dictum. On this point, I would agree for the reason, inter alia, that the chemist had said during the trial of Loo Keck Leong that, though he was not able to tell if the plant material had undergone any cannabis resin extraction process, he found that the presence of cannabis resin was not merely as a trace residue. He said, to quote: 'it needs quite a bit of the presence of cannabis resin to give a positive reaction'. This was the positive reaction he found in the Dequinois Levine test he did on the seized plant material. His expression 'quite a bit' would appear quite close to the meaning of the word 'substantial' used by PW1 in the current case, considering that both expressions lack precision. F G H

It is this question of substantial extraction of cannabis resin which has given rise to a difficulty in this court. In my opinion, by the seperate but close juxtaposition of the definition of 'cannabis' and of 'cannabis resin' in s 2 of the Act, the legislature had clearly intended to make a distinction between the offence of possession or trafficking in cannabis resin on the one hand and cannabis plant in its natural state, in wet or dried (but untampered by any extraction process) form on the other hand. This would explain the phrase used in the governing definition being expressed as 'plant ... from which resin has not been extracted ...'; it being so expressed, to bring I

within its ambit, eg a seizure of freshly harvested green cannabis plants. I am fortified in this construction as PW1 had also admitted under cross-examination that 'ganja plant can be planted in our Malaysian climate and I have received samples from the police of live plants found in this area'. He also said 'I have examined a growing ganja plant. That would be an ideal state of the plant where the resin had not been extracted at all'; an ideal state of a plant that fits perfectly the governing definition.

What is left for judicial determination is, what is meant by the word 'substantial'. Substantial indicates a matter of real substance, far more than that which could be termed as 'mere presence'. It is an unsatisfactory medium for carrying the idea of some assertainable proportion of the whole, when the whole is known. Substantial is not a word with a fixed meaning in all contexts. It may be used to indicate worth or stability. Used in a comparative setting, 'a substantial part' as against 'the remaining part', it suggests a dichotomy into the substantial part, and the non-substantial, a contrast, according to cubic contents, or area, between the greater and the less, as between the essential and the subordinate or incidental. Under the English Copyright Act, it was held, on the issue of whether there was substantial reproduction of the original by the defendant, the word 'substantial' ought to be decided by the quality rather than the quantity of the reproduction. See *Ladbroke (Football) Ltd v William Hill (Football) Ltd.*[5] Whereas in respect of virtually all other matters, the word 'substantial' is predicated or premised on the availability of an ascertainable whole amount or quantifiable gross quantity eg under the English Rent Restrictions Act, the question whether the amount of rent, which is fairly attributable to the use of the landlord's furniture in the demised premises, forms a substantial portion of the whole rent for the demised premises, would necessitate a comparison of such rent — when ascertained — with the amount of the whole rent. See the Privy Council cases of *Palser v Grinling; Property Holding Co Ltd v Mischeff*.[6]

As the ingredient (cannabis resin) is a matter of science and not a question of ordinary fact normally perceivable by the senses (see decision in *Loo*'s case[2]), could the chemist in the present case, justificably opine that cannabis resin had not been substantially extracted — which would logically entail his having discovered that there was still substantial quantity of resin present in the plant material — when he had also acknowledged that he did not quantify the whole or total amount of cannabis resin extractable from the samples of the plant material he had examined. As he had also not carried out any tests to determine the proportion of resin found inside as opposed to outside the plant material, his statement that more resin is normally found outside rather than inside the plant material could not be anything more than a bare assertion. Data such as the total amount of cannabis resin extractable from a given plant material are indeed ascertainable, irrespective of the geographical origin of the plant material, though this may not be a very practicable endeavour.

For all the above reasons, I am of the view that the recent amendment makes for good practical sense, despite its critics, as it avoided the use of the word 'substantial' in the amended definition. It may be permissible to speak of a substantial fortune, a substantial meal or a substantial man, but is it

permissible to speak of a substantial presence of cannabis resin, the ingredient being a matter of science? A

As such, I hold that:

(a) as PW1 could not positively say that the plant samples he had taken from P3–P10 and examined by him, was plant material from which 'cannabis resin had not been extracted', as defined under the governing definition; and B

(b) his opinion that there was 'no substantial extraction' of cannabis resin as expressed in his evidence, even if accepted by me (which I do not), is not sustainable and is devoid of any rational, scientific or semantical basis; nor is it based on the results of any or any proper analysis by him on the presence of cannabis resin in the samples taken from P3–P10; C

the essential ingredient of the charge that the plant material seized was cannabis as defined under the governing definition in s 2 of the Act has not been made out by the prosecution at the end of the prosecution case. This essential ingredient of the charge being absent, would, even if unrebutted by the defence (say, should the accused remain silent when called to enter upon his defence), not warrant a conviction. D

On the grounds aforesaid and pursuant to s 180 of the Criminal Procedure Code (FMS Cap 6), I hereby acquit and discharge the accused without calling him to enter upon his defence.

As my decision here would involve potential repercussion on several other pending cases in the country involving cannabis, under the governing definition of cannabis, I have taken pains to ensure that this judgment and the notes of evidence are made available to the DPP forthwith today, so as to expedite an appeal by the public prosecutor, if so decided. E

Accused acquitted. F

Reported by Angela Png

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